NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

DANIEL VARLEY, Plaintiffs, v. THE UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 14-3832 (RMB) **MEMORANDUM OPINION**

BUMB, District Judge:

This matter comes before the Court upon Plaintiff's amended complaint ("Amended Complaint") submitted after this Court's sua sponte screening and non-prejudicial dismissal of his original complaint ("Original Complaint"). See Docket Entries Nos. 1-4.

Plaintiff, a federal inmate formerly confined at FCI Fort Dix ("Fort Dix"), asserts that, on October 25, 2011, while he was at Fort Dix common-quarters playing cards with other inmates, a television (mounted on the wall or ceiling) fell and hit his head. See id. at 5; see also Docket Entry No. 4, at 3, 16, 22. Alleging that he suffered multiple serious injuries as a result of that accident, Plaintiff timely filed a Federal Tort Claims Act ("FTCA") claim against the Government alleging negligence on the part of its agents, invoking the res ipsa loquitor legal

principle and seeking $1 million in damages. See Docket Entry No. 4, at 14, 16, 22.

To justify his claim for said amount, he claimed that, prior to the accident, he was in perfect health but after the accident he had a "concussion, chronic post concessive syndrome (with post-traumatic headaches, dizziness[] and lightheadedness), [an unspecified] vestibular dysfunction due to inner ear trauma, [an unspecified] eyelid dysfunction, cervicalis and related neck/back pain, [an unspecified] shoulder pain, [an unspecified] arm pain, spinal spondylosis, emotional disturbances and a scalp laceration." Id. at 16-17 (parenthetical in original).[1]

The Government denied Plaintiff's FTCA claim stating:

> Damages are sought in the amount of $1,000,000.00 based on a personal injury claim. Specifically, [Plaintiff alleged that he] was injured when a television hit his head at FCI Fort Dix on October 25, 2011. Investigation reveals [that Plaintiff] was medically assessed by FCI Fort Dix Health Services staff after a television allegedly fell on him. His assessment was unremarkable and [revealed merely a scalp laceration, and] he was transported to a community hospital where [that] laceration was closed. No acute spinal or skull injury was noted. Subsequent examinations by specialists showed [Plaintiff's] back and neck pain were not caused by a traumatic event. Throughout his incarceration at FCI Fort Dix, [Plaintiff] received appropriate medical treatment, including evaluations by specialists, as necessary. There is no evidence to suggest he experienced a *compensable loss* as the result of

[1] The Court notes Plaintiff's contradictory allegations: that, prior to the alleged incident, he was in perfect health but numerous preexisting medical conditions negatively affected his spine as a result of the accident.

> *negligence* on the part of any [Government agents]. . . . [Plaintiff's $1,000,000.00] claim is denied.

Id. at 22 (emphasis supplied).

From the denial it appears, although it is unclear, that the Government conceded the negligence aspect but clearly disputed the injuries/damages claimed by Plaintiff. See id. Notified of the denial, Plaintiff filed his Original Complaint asserting the same facts, claiming that he suffered the same numerous serious injuries and seeking $1 million in damages.[2] See Docket Entry No. 1. However, instead of asserting that his injury was caused by negligence of the Government agents (as he did during his underlying administrative proceeding), Plaintiff altered his legal position and: (a) named an unknown manufacturer/designer ("Producer") of the television mount and the Producer's staff ("Staff") as defendants; and (b) de facto raised the "alternative

[2] Although the administrative process envisions a negotiation and settlement stage, including resort to alternative dispute resolution techniques, "[a]s is typical in tort settlement discussions, the agency will seek information to justify a claim." http://apps.americanbar.org/abastore/products/books/abstracts/5010071%20chap%205_abs.pdf; see also See The Administrative Claim Process: Procedural prerequisites to Making a Tort Claim at 50, n.23 http://apps.americanbar.org/abastore/products/books/abstracts/5010071%20chap%205_abs.pdf("Absent a delegation of greater authority[,] an agency has $25,000 in settlement authority") (citing 28 C.F.R. §§ 14.6(b)–(e) and 14.10). This Court has no information as to whether Plaintiff was asked to provide and did furnish any information substantiating his claim that he suffered injuries, other than the laceration, as a result of the accident. See generally, Docket Entries Nos. 1, 4.

liability" theory by stating that his injuries had to be caused either by negligence of the Government agents maintaining the Fort Dix or the Producer/Staff's negligent design/manufacturing of the mount. See id. That said, the Original Complaint still invoked the res ipsa loquitor principle. See id. (maintaining that, if the Producer/Staff were not negligent, then it necessarily had to be that the Government agents were negligent or, in the alternative, if the Government agents were not negligent, then it necessarily had to be that the Producer/Staff were negligent because the television could not have possibly fallen on Plaintiff unless one of these two scenarios played out).

Pursuant to 28 U.S.C. § 1915A(a) and (b), and 42 U.S.C. § 1997e(c), this Court screened the Original Complaint for sua sponte dismissal. See Docket Entry No. 3. The Court noted that the FTCA claim was jurisdictionally deficient for Plaintiff's failure to plead the amount sought during the administrative process and directed him to correct that oversight. See id. at 2-3. Then, turning to Plaintiff's pleading of the res ipsa loquitor principle in lieu of any facts implicating the Producer/Staff, this Court explained that such pleading did not comport with Rule 8. See id. at 3 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In addition, this Court pointed out that,

> [g]enerally, where there are multiple defendants, the court must be presented with allegations supporting a

> legal conclusion that the defendants had joint control over the injury-inflicting instrumentality. See Creekmore v. United States, 905 F.2d 1508 (11th Cir. 1990); accord Allendorf v. Kaiserman Enters., 266 N.J. Super. 662, 630 A.2d 402 (N.J. Super. Ct. App. Div. 1993) (joint control by building owner and company maintaining elevator); Meny v. Carlson, 6 N.J. 82, 94, 77 A.2d 245 (1950) (joint control of scaffolding); cf. Smith v. Claude Neon Lights, Inc., 110 N.J.L. 326, 164 A. 423, 1933 N.J. LEXIS 488 (Ct. E. & App. 1932) (building owner and owner of the sign that fell from the building). While, in Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975), the Supreme Court of New Jersey "accorded a greater protection to innocent plaintiffs in a res ipsa loquitor case involving strict products liability by one defendant and negligence" by another, Huddell v. Levin, 537 F.2d 726, 746 (3d Cir. 1976) (discussing Anderson), the lenient "holding in Anderson was restricted to instances in which the plaintiff suffered injury while being an unconscious hospital patient." Id.; see also Shackil v. Lederle Laboratories, Div. of American Cyanamid, Co., 116 N.J. 155, 173, 561 A.2d 511 (1989) (cautioning against application of Anderson to other circumstances because the "approach, which could conceivably be characterized as one of alternative liability, has not been duplicated in any New Jersey case since Anderson thus rendering the Anderson holding limited to one factual context").

Id. at 3-4 (brackets omitted).

Since "Plaintiff was not an unconscious hospital patient when the television allegedly fell on him," id. at 4 (internal quotation marks omitted), this Court directed him to replead his claims with the degree of specificity required by Rule 8, as explained in Iqbal and Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009), and to file his position statement detailing his basis, if any, for his current reliance on the res ipsa loquitor principle and for adopting an Anderson-like theory. Id.

at 4-5. The Amended Complaint followed. See Docket Entry No. 4.

As to Plaintiff's FTCA claim, the Amended Complaint duly cured the deficiencies by: (a) asserting that the administrative claim was also in the amount of $1,000,000; and (b) averring that Plaintiff did not commit any act that contributed to or caused his alleged injuries, and no persons other than Government agents caused his injuries. See id.

However, the remainder of Plaintiff's Amended Complaint and his position statement: (a) merely recited the facts already stated in the Original Complaint; (b) repeated an unadorned reference to the res ipsa loquitor principle; and (c) recited an Anderson-like theory by claiming that, if the television fell, it must mean either that the Government agents were negligent or the Producer and its Staff were negligent. See id. The position statement closed with a request for discovery so Plaintiff would gather facts needed to implicate, exclusively, either the Government agents or the Producer and its Staff, or "any other parties liable in this matter."[3] See id. at 25-26. So drafted, the Amended Complaint, albeit a represented pleading, evinces Plaintiff's misreading of Rule 8 requirements, as well as his

[3] Plaintiff's reference to "any other parties liable in this matter" suggests his realization that the acts or omissions of persons/business entities other than the Government agents and Producer/Staff might have been ultimately the reason why the television fell on Plaintiff. Accord this Opinion, note 3.

misunderstanding of the res ipsa loquitor principle, the circumstances allowing reliance on the alternative liability theory, the preponderance of evidence standard governing to the law of torts and the unavoidable uncertainties of litigation.

It is axiomatic that the pleading requirements of Rule 8 should state the *facts* underlying a plaintiff's claim, not that plaintiff's self-serving conclusions, bold deducements, factless conjecture or alternative speculations.

> A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." . . . [A viable] complaint must contain sufficient factual matter . . . to "state a claim to relief that is plausible on its face." . . . The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Iqbal, 556 U.S. at 677-79.

In fact, in Iqbal, a plaintiff-detainee attempted to plead his claims by asserting alternative theories. He challenged his harsh treatment while in detention and maintained that the treatment had to be discriminatorily based on his race, religion, or national origin. See id. at 666-69. In order to "hedge his bets," he named, as defendants, the prison officers who subjected him to the challenged treatment and, in addition, many high-ranking government officials, all in order to assert that, even

if the prison officers mistreated him without a discriminatory intent, then it must have been that there were discriminatory policies that the high-ranking officials coined and made the prison officers to comply with, and that compliance had to produce the alleged harsh treatment. Id. The high-ranking officials moved for dismissal of the detainee's complaint pointing out that his alternative theories could not qualify as facts implicating them in any wrong. See id. at 669. The Supreme Court agreed, stressing that, under Rule 8, the detainee was not allowed to hale any defendant into the court unless he could plead actual facts personally and plausibly implicating that defendant in the alleged wrongs. See id. at 676-77. Derivatively, the Iqbal Court concluded that the detainee could neither obligate any defendant to disprove the detainee's factless hypotheses nor could he force the defendants to litigate his hypotheses among themselves, so the defendants would try to pin his claims on each other. Focusing on *that* legacy of Iqbal, the Court of Appeals observed that Iqbal hammered "the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before [Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), the predecessor of Iqbal]." Fowler, 578 F.3d at 210.[4] Therefore, unless Plaintiff states actual facts

[4] The Fowler Court referred to the standard in Conley v. Gibson, 355 U.S. 41 (1957), that allowed for a construction of

personally implicating *each* Defendant he names, Plaintiff's claims against those Defendants as to whom no such facts are asserted necessarily fail to pass muster under Rule 8 and are subject to dismissal for failure to state a claim upon which relief can be granted, *without any discovery*.[5] Here, no fact in Plaintiff's Original and Amended Complaints implicates the Producer or its Staff, or any other unspecified entity. Moreover, while Plaintiff's Original Complaint did, and his Amended Complaint does, state an Iqbal-plausible FTCA negligence claim against the Government, his continuous attempts to "hedge

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the Rule 8 pleading requirement in a fashion effectively allowing for such distorted litigation process simply because one sentence in Conley read that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim," thus suggesting that even a factless, speculative claim had to be deemed viable unless it was wholly "fantastical or delusional" on its face. See Denton v. Hernandez, 504 U.S. 25, 33 (1992).

[5] See Twombly, 550 U.S. at 558-60 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries,' the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting [an actual viable claim] that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the discovery process will reveal relevant evidence' to support a . . . claim") (citations and internal quotation marks omitted).

his bets" yielded a legal position incompatible with his current reliance on res ipsa loquitor: because res ipsa loquitor is merely a short-hand reference to a common law principle of circumstantial evidence.

> Negligence, like any other fact, may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. . . . Like any other evidence, it may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming. The gist of it, and the key to it, is the inference, or process of reasoning by which the conclusion is reached. This must be based on the evidence given, together with a sufficient background of human experience to justify the conclusion. It is not enough that plaintiff's counsel can suggest a possibility of negligence. The evidence must sustain the burden of proof by making it appear more likely than not. The inference must cover all elements of negligence, and must point to a breach of the defendant's duty. . . . One type of circumstantial evidence . . . is that which is given the name of res ispa loquitor.

W. Page Keeton, Prosser and Keeton on the Law of Torts, §39, 242-43 (5th ed. 1984) (footnotes omitted).

Stressing that res ipsa loquitor was nothing but a reference to a certain "type of circumstantial evidence," and the reference represented "two principles, one concerning with the sufficiency of circumstantial evidence, the other with the burden of proof, [that] gradually became confused and intermingled, and from which fusion there developed an uncertain [modern] 'doctrine' of res ipsa loquitor," the treatise explains:

> The statement of the doctrine most often quoted is that . . . '[t]here must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' The conditions usually necessary [but not always sufficient] for the application of the principle of res ipsa loquitor . . . are as follows: (1) the event must be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an . . . instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution of the part of the plaintiff."

Id. at 244 (citations and footnote omitted).

Applying this test to the "quite intricate question[] where the plaintiff proceeds against two or more defendants," the treatise clarifies that "the logical rule . . . is . . . that the plaintiff does not make out a preponderant case against either of two defendants by showing merely that the plaintiff has been injured by the negligence of one *or* the other." Id. at 251 (emphasis supplied). Correspondingly, a plaintiff's attempt to "hedge his bets" by naming each and every hypothetical entity as defendant, without stating actual facts sufficient to yield a preponderant case against these defendants, is a litigation tactic stripping the plaintiff from a chance to prevail on any of his claims. See id. at 242 ("It is often said that negligence must be proved, and never will be presumed. . . . What is

required is evidence, which means some form of proof; and it must be evidence from which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not. As long as the conclusion is a matter of speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained"). In sum, the plaintiff must state the facts he has and, upon accepting the uncertainties inherent to the process of litigation, make a bona fide argument, if such is available, that these facts amount to a preponderant case against the defendant actually implicated by the facts. See id. at 247-48 ("The inference of negligence may arise where a definitive cause is known, or where the accident is more or less a mystery, with no particular cause indicated [because t]he plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was [a particular defendant's] negligence associated with the cause of the event than there was not").

In light of the foregoing, Plaintiff's reliance on the res ipsa loquitor principle during his administrative proceeding, see

Docket Entry No. 4, at 16, was not unreasonable since, at *that* stage, Plaintiff was focusing on the time when the mounted television was in exclusive control of the Government agents maintaining the Fort Dix. Here, his *current* reliance on res ipsa loquitor is misplaced since: (a) he is focusing on the entire lifetime of the mount, from the moment of its design and until the time when the television fell on Plaintiff; (b) his allegations are laden with concessions that the Government did not have exclusive control over the mount during the mount's entire lifetime; and (c) the overriding theme of his allegations has become the uncertainty as to whether the Government agents were negligent or if the Producer and its Staff were negligent, or if some other parties were negligent. Read in toto, these allegations can no longer be squared with the res ipsa loquitor principle. In sum, the pleadings: (a) merely state an Iqbal-plausible FTCA claim of garden variety negligence against the Government; and (b) verify that Plaintiff has no facts to plead a plausible claim of any kind against the Producer or its Staff, or against other entity or person.

Plaintiff's resort to an Anderson-like theory cannot cure that deficiency. The concept of alternative liability is narrow and applied only in the rarest scenarios.

> The theory of alternative liability was initially adopted by the California Supreme Court in Summers v. Tice, 33 Cal. 2d 80 (1948). In Summers, the plaintiff

> was [injured] when two hunters *negligently* fired their shotguns. Because the defendants fired simultaneously, the plaintiff was unable to identify which defendant was actually responsible for the injur[ies.[6]] The California Supreme Court shifted the burden of proof to the defendants to offer evidence to determine which one caused the injur[ies, thus] relax[ing] the plaintiff's burden of identifying the tortfeasor who caused the plaintiff's injur[ies]. Because such [alternative liability] theory is only applicable when the plaintiff has *already proved that independent acts of negligence were simultaneously committed by two or more tortfeasors*, the theory . . . is thus inapplicable [where the plaintiff] did not present evidence sufficient to support a finding that both defendants acted negligently.

Transco Leasing Corp. v. United States, 896 F.2d 1435, 1446 (5th Cir. 1990) (emphasis supplied) (citing, inter alia, Restatement (Second) of Torts § 433B (1963), for the observation that the

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[6] [In Summers,] Plaintiff's action was against both defendants for an injury to his right eye and [his lip] as the result of being struck by bird shot discharged from a shotgun. . . . [He] and the two defendants were hunting quail . . . . Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 1/2 size shot. . . . In the course of hunting, [P]laintiff proceeded up a hill, thus placing the hunters at the points of a triangle. . . . Both defendants shot at the quail [at the same moment, and both were] shooting in [P]laintiff's direction. . . . One [bullet] struck [P]laintiff in his eye and another in his upper lip.

Summers, 33 Cal. 2d at 82. Since both bullets went astray after striking the plaintiff, and neither bullet was located in the woods, an expert correlation of these bullets to the defendants' shotguns was rendered impossible, and that fact left open the possibility that both bullets could have been fired from the same shotgun, and only one defendant, rather than both, might have been responsible for the plaintiff's injuries.

plaintiff cannot "rely upon the theory of alternative liability to shift to the [defendants] the burden of exculpating themselves" without first showing negligence on the part of each defendant and then showing that the plaintiff could not reasonably delineate the exact relation between each defendant's negligence and the plaintiff's injury); see also Huddell, 537 F.2d at 744-45 (stressing that "[t]he usual rule placing the burden of proof upon a plaintiff has been relaxed in [the rarest] situations . . . . One such situation is what Prosser has termed 'clearly established double fault and alternative liability.' That is, both defendants are [shown to be] wrongdoers and, as such, have brought about the situation in which the victim was injured. . . . In this circumstance, courts will hold both defendants liable and impose the burden on each to prove non[-] culpability") (citing Summers, 33 Cal. 2d 80;, Bowman v. Redding & Co., 449 F.2d 956, 968 (1971); Restatement (Second) of Torts § 433B(3); and Prosser, Torts 243).

Hence, a plaintiff's reliance on res ipsa loquitor is unwarranted unless it is shown that *each and all* defendants in the group were acting *negligently and simultaneously* with all other defendants in the group.

> Various theories are advanced by [Plaintiff in the hope] for dispensing with proof that the [acts] of these defendants caused or contributed to caus[ing his injury]. Some clearly will not serve to do so. [Those the least] in point are concert of action theories,

> where persons acting in knowing collaboration cause an injury and are held liable in solido for the effect of their common scheme. Also to be distinguished are theories of alternative liability . . . and of group res ipsa loquitur. All of these [theories] concern defendants who were proved to have some factual connection with the plaintiff's injury; to apply them to defendants as to which there is no proof of any such connection would beg the question of causation entirely.

Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 582-83 (5th Cir. 1983).[7]

Although the concept of res ispa loquitor is narrow and that of alternative liability is even narrower, there is a still-finer rule st forth in Anderson, which articulated a public policy exception built on res ipsa loquitor and alternative liability.

> [Anderson presented a consolidated set of actions, i.e.,] negligence-products liability actions [that] had their inception in [the plaintiff's] back operation, performed by defendant [Surgeon]. During the [operation], the tip . . . of . . . a forceps-like instrument[] broke off while the tool was . . . in plaintiff's spinal canal. The [S]urgeon attempted to retrieve the metal but was unable to do so. . . . The imbedded fragment caused . . . Plaintiff a significant

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[7] See also Jesse v. Dick's Sporting Goods, Inc., 2014 U.S. Dist. LEXIS 45025, at *11-12 (E.D. Mich. Apr. 2, 2014) ("In short, plaintiff asserts only that the [his injury was either a result of one defendant's equipment] or something placed in the room [belonging to another defendant] (or the wall of [that] room itself), and cannot even rule out a freak . . . incident. This kind of alternative liability argument (if not x, then y) simply is not enough to create liability on the part of either defendant. Thus, this case has not moved from the 'realm of conjecture' into a 'field of legitimate inferences,' and plaintiff's speculation is simply not enough to allow him to survive defendants' motions on the issue of negligence") (parenthetical in original).

> and permanent physical injury . . . . Plaintiff sued [the Surgeon] alleging that [the Surgeon's] negligent action caused the [instrument] to break . . . , [he also sued] the medical supply distributor which furnished the [instrument] on a warranty theory [and] the manufacturer of the [instrument] on a strict liability [theory], alleging that the [instrument] was a defective product. . . . [W]hen all the evidence had been presented, no theory for the cause of the [instrument's] breaking [remained] within reasonable contemplation save for the possible negligence of [the Surgeon] in using the instrument, or the possibility that the [S]urgeon had been given a defective instrument . . . . [T]he jury [duly instructed on the res ipsa loquitur principle, as Plaintiff requested,] returned a finding of no cause as to each defendant. On appeal, the . . . panel . . . held that the verdict [in terms of its outcome, was against public policy because it] represented a miscarriage of justice, and that on the facts of this case it was clear that one of the parties was liable [although Plaintiff, who was an unconscious patient under anesthesia at the time the surgery took place, had no means to obtain facts allowing him to implicate one of the defendants more than the other].

Anderson, 67 N.J. at 294-96.

The Supreme Court of New Jersey admitted that allowing the Anderson plaintiff "a second chance before a jury" could not have been done under the res ipsa loquitor principle, see id. at 297 ("we note that [sending this] case . . . back on [the basis of an error in the jury res ipsa loquitor instructions would merely be] a pretext") but, to remedy the situation, it coined a "relaxed," quasi-alternative liability theory without the requirement to show that all defendants in the group were acting negligently and simultaneously with all other defendants in the group:

> The position adopted by the [appellate panel] seems to us substantially correct [in terms of its public policy reasoning]: that is, at the close of all the evidence, it was apparent that at least one of the defendants was liable for plaintiff's injury, because no alternative theory of liability was within reasonable contemplation. Since defendants had engaged in conduct which activated legal obligations by each of them to plaintiff, . . . the failure of any defendant to prove his nonculpability would trigger liability . . . . A no cause of action verdict against all . . . defendants will be unacceptable and would work a miscarriage of justice . . . . [True, in] the ordinary case, the law will not assist an innocent plaintiff at the expense of an innocent defendant. However, in the [unique] type of case we consider here, where an unconscious or helpless patient suffers an admitted mishap not reasonably foreseeable and unrelated to the scope of the surgery (such as cases where foreign objects are left in the body of the patient), those who had custody of the patient, and who owed him a duty of care as to medical treatment, or not to furnish a defective instrument for use in such treatment can be called to account for their [potential] default. They must prove their nonculpability, or else risk liability for the injuries suffered.

Id. at 298.

Mindful of the fact that Anderson was based on public policy and could not qualify as a true res ipsa loquitor precedent or a genuine alternative liability decision, the Court of Appeals stressed that the "holding in Anderson [was] restricted to instances in which the plaintiff suffered injury while [being] an unconscious hospital patient." Huddell, 537 F.2d at 746. This Court already explained that very point to Plaintiff in its prior opinion so he would be able to detail his reasons for resorting to an Anderson-like theory. See Docket Entry No. 3, at 3-4. In

response, Plaintiff filed the position statement wholly barren of any explanation as to his reasons for selecting the liability theory implicating, alternatively, the Government agents or the Producer and its Staff, or other unidentified entities/persons; the position statement merely offered to this Court Plaintiff's statement that such liability had to attach.[8] Based on the foregoing, this Court will construe the Amended Complaint with lenience afforded to pro se pleadings, see Erickson v. Pardus, 551 U.S. 89 (2007), and: (a) proceed Plaintiff's FTCA negligence claim against the Government past the sua sponte dismissal stage; and (b) dismiss Plaintiff's remaining challenges for failure to

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[8] Allowing Plaintiff another opportunity to amend his pleading as to the Producer or Staff, or the unspecified other entities, would be facially futile. True, a plaintiff may be granted "leave [to amend, but only] when justice so requires." Foman v. Davis, 371 U.S. 178, 182 (1962); see also Lorenz v. CSX Corp., 1 F.3d 1406, 1414(3d Cir. 1993). "Allowing leave to amend where 'there is a stark absence of any suggestion by the plaintiffs that they have developed any facts since the action was commenced, which would, if true, cure the defects in the pleadings . . . would frustrate [the court's ability] to screen out lawsuits that have no factual basis.'" Cal. Pub. Empl'es. Ret. Sys. v. Chubb Corp., 394 F.3d 126, 164 (3d Cir. 2004); see also Cybershop.com Sec. Litig., 189 F. Supp. 2d 214, 237 (D.N.J. 2002) (procedural safeguards "would be 'meaningless' if judges liberally granted leave to amend on a limitless basis"); accord McKinney v. Passaic County Prosecutor's Office, 2009 U.S. Dist. LEXIS 53216, at *13 (D.N.J. June 24, 2009) ("Since Plaintiff had [prior] opportunities to plead his claims, and yet failed to assert any facts suggesting that [these] claims are plausible, it would be futile to allow Plaintiff [another] bite of this well-chewed apple"); accord Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 731 (1973) ("adjudication cannot rest on [a] 'house that Jack built' foundation").

state a claim upon which relief can be granted. The Government will be directed to promptly file its response.[9]

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[9] On July 25, 2014, Plaintiff filed an electronic notice that he served his Amended Complaint. See Docket Entry No. 5, at 28-29; accord Fed. R. Civ. P. 4(i)(A)(ii) and (B); see also Docket Entry No. 7 (summons returned executed on July 29, 2014). In contrast, the Original Complaint did not include any service document, and so it appeared to the Court that the Government was unaware of this suit at the time this Court screened the Original Complaint. See Docket Entry No. 1. Thus, this Court directed the Government to enter an appearance for the purpose of receiving notice only. See Docket Entry No. 3, at 7. On July 28, 2014, that is, three days *after* Plaintiff stated that the Amended Complaint was served, the Government, refused to comply with this Court's order to enter a notice appearance by citing Fed. R. Civ. P. 4(i). See Docket Entry No. 7 ("Because the United States has not yet been served . . . we will not be filing a notice of appearance"). Putting aside that the Government did not receive notice as to service of the Amended Complaint because it refused to allow the Court's Order, the rationale of the Government's contempt is not immediately apparent to this Court. A notice appearance is neither a waiver of service nor a concession of in personam jurisdiction, or does it trigger any obligation. It merely enables the party to keep up with the developments in the matter so, if the need arises, the party is well positioned to facilitate an expedient resolution of the matter. See http://www.njd.uscourts.gov/sites/njd/files/PoliciesandProcedures2014.pdf (an ECF user who makes appearance receives "a notice automatically generated . . . at the time [any] document is filed . . . and [can] retrieve the document automatically"); see also Docket Entry No. 3, at 6-7 (the Court's order stating that, regardless of notice appearance, the Government did not have to make any filings until the Amended Complaint survived sua sponte screening); compare Fed. R. Civ. P. 12(a)(2) ("The United States [if/once subject to in personam jurisdiction,] must serve an answer"); accord McKnight v. United States, 2014 U.S. Dist. LEXIS 86164, at *52 (D.N.J. June 25, 2014) (notice appearance by the Government in a newly created matter, as well as notice appearance by the New Jersey Office of Attorney General in another newly created matter); Hardwick v. United States, 2012 U.S. Dist. LEXIS 175914, at *12 (D.N.J. Dec. 11, 2012) (notice appearance by the Government upon sua sponte screening of a represented pleading); Rodriguez v. New Jersey, 2014 U.S. Dist. LEXIS 84732, at *32-33 (D.N.J. June 23, 2014).

An appropriate Order follows.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: August 4, 2014